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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RUBEN MANUEL INIGUEZ, Defendant and Appellant.	B186450 (Los Angeles County Super. Ct. No. LA042497)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin Lescovitz, Judge. Affirmed.

Rodger Paul Curnow, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Joseph Lee and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Ruben Iniguez and a fellow gang member shot two people, killing one. A jury convicted Iniguez of second degree murder and attempted premeditated murder and found true gang and personal use allegations. After strike and prior serious felony allegations were proven true beyond a reasonable doubt, the trial court sentenced Iniguez to a term of 80 years to life for the murder plus a consecutive term of 70 years to life for the attempted murder. Iniguez appeals, claiming insufficiency of the evidence and instructional, evidentiary and sentencing error. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

On the night of February 1, 2003, Sergio Gutierrez, Shawn Stephens, Carlos Castillo, Fernando Fulgar, Yadira Pinuelas (Fulgar's girlfriend), Lourdes Pinuelas (Yadira's sister), Patti Hernandez, Alex Santoyo and others attended a party for America Nazarite's 15th birthday. Most of the partygoers were about 15 or 16. Also in attendance were gang members with guns, including Iniguez (who used the name "Grouchy") and Alexander ("Shystie") Chavez. The party was at Nazarite's North Hollywood home, an area claimed by Iniguez's gang—Vineland Boys. Iniguez drew attention to himself because he was loading a rifle and "showing it off." He also took off his shirt and was "showing off" the gang tattoos on his body, and he had multiple gang tattoos on his face and head. In addition, he was "hitting [people] up"—asking where (meaning which gang) they were from. Fulgar identified himself to Iniguez as a new Vineland Boys member of a few months.

Later, Gutierrez, Stephens (who is African American) and Castillo left the party through the front door and walked two blocks to pick up Castillo's girlfriend Lorena Garcia. With Gutierrez in front, Stephens further back and Castillo and Garcia some distance behind, they walked back to the party through the "back field" bordering the

Nazarites' backyard because it was a short cut. The field was sufficiently lit to see who they were and that they were all empty-handed and unarmed. No one in the group was a gang member. As the four approached, Iniguez (carrying a rifle) and Chavez (carrying a handgun) walked through the yard and crossed over a partially collapsed chain-link fence surrounding the Nazarite property. When Fulgar saw Iniguez and Chavez crossing the field, he felt obligated "to have their back" so he caught up to them although he was unarmed. When Stephens saw Iniguez and Chavez approaching, he thought they were friends saying "What's up" because they put their hands up about shoulder level, palms open, with "fingers both pointed toward the center at about a 45-degree angle."[1]

Then Iniguez and Chavez stopped walking, took off their t-shirts and wrapped them around their arms. Chavez started shooting a handgun. Iniguez dropped to his knees and, after Chavez had shot multiple times, started shooting the rifle. After the first of about 20 shots were fired, Castillo and Garcia dropped to the ground as Stephens and Gutierrez ran. Stephens was hit in the arm. Gutierrez was shot in the chest (and later died from his injuries). The shooters ran to a red BMW parked nearby. Police recovered expended casings from both a nine millimeter and a .40 caliber gun.

A couple of days after the shootings, Iniguez, Chavez and Iniguez's brother drove up to Fulgar. They all got out and Iniguez pulled Fulgar aside, telling him "to keep [his] mouth shut."

About two weeks later, Iniguez was arrested.[2] Fulgar was arrested a few days after Iniguez, and shortly thereafter, began cooperating with police. Iniguez was charged with murder as to Gutierrez and attempted murder as to Stephens, with special gang and

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[1] A police gang expert testified at trial that Vineland Boys used a hand sign in which they would show their index and middle fingers in the shape of a "V."

[2] Witnesses identified Iniguez from "six pack" photo lineups.

personal firearm use allegations as to both counts. It was further alleged that Iniguez had three prior strikes, two prior serious felony convictions and two prison priors.[3]

At trial, the People presented evidence of the facts summarized above along with gang expert testimony as to Iniguez's membership in the Vineland Boys gang and its dominance in the area, derived from the pervasive knowledge that Vineland Boys was a very violent gang that killed witnesses, police officers and its own. In the gang expert's experience, no rival had ever dared to attempt a drive-by or walk up shooting in Vineland Boys territory. Vineland Boys gang members were not afraid of rivals, he said; to the contrary, they "actively . . . hunt[ed] for victims." It was "extremely common" for gang members to kill non-gang members; such shootings enhanced the shooters' status as well as the gang's reputation as being "crazy" with "no regards to other people" and let people know that it "doesn't matter . . . who is shot."

Fulgar acknowledged that he had pled guilty to manslaughter, admitted gang and principal gun use allegations and was sentenced to a 17-year prison term; he testified against Iniguez under a use immunity grant. He testified that Gutierrez had been a friend of his and that he felt it was "only right" to do what he was doing.

After Fulgar testified against Iniguez at trial, a Los Angeles County deputy sheriff (Peter Bringas) took Iniguez to his cell. Bringas heard Iniguez tell another inmate (Luis Rojas) to find out if there were any other "Southsiders"—meaning Southern Hispanic gang members—in the main lock-up. Iniguez identified Fulgar by name and gave specific descriptions of Fulgar's tattoos; he said Fulgar had testified against him and told Rojas to spread the word that Fulgar was a "snitch" and to "go ahead and take care of business . . . ."

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[3] There was also a great bodily injury allegation as to Stephens, but this allegation was later dismissed.

In Iniguez's defense, Dr. Louis Yablonsky testified about gang culture and said gang members "always ha[ve] the fear of imminent danger in their life from rival gangs."[4]

A jury convicted Iniguez of second degree murder and attempted premeditated murder and found true the special firearm and gang allegations. After finding beyond a reasonable doubt that Iniguez had suffered prior strike and serious felony convictions, the trial court sentenced Iniguez to an aggregate term of 150 years to life in state prison, calculated as follows: 80 years to life in state prison comprised of 15 years to life tripled under the Three Strikes Law, plus a 25-year enhancement (Pen. Code, §§ 12022.53, subds. (d)-(e) and 186.22, subd. (b) [all undesignated statutory references are to the Penal Code), plus two 5-year enhancements under section 667, subdivision (a), on the murder count, plus a consecutive term of 70 years to life for the attempted murder—15 years to life tripled under the Three Strikes Law, plus a 25-year enhancement (§§ 12022.53, subds. (d)-(e) and 186.22, subd. (b)).

Iniguez appeals.

DISCUSSION

I. Iniguez Has Failed to Demonstrate Prejudicial Error in the Trial Court's Refusal to Instruct the Jury as to Mistake of Fact (CALJIC No. 4.35).

Iniguez's counsel said he was requesting CALJIC No. 4.35 because he "believe[d] that the fact situation show[ed] the possibility of a grievous mistake insofar as the actions

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[4] Fulgar had testified that, on the night of the shooting, he had heard someone say to watch out for "anyone from Pacoima" (a rival of the Vineland Boys) and that Iniguez had indicated there might be some trouble from this gang. (Dr. Yablonsky had not spoken with Iniguez or any witness in the case.)

of [Gutierrez] and [Stephens were concerned]."[5] The trial court responded, "I think all those issues are covered by the self-defense instructions so I am not going to give [CALJIC No.] 4.35," and defense counsel said nothing further.

Leaving to one side the issues of whether Iniguez waived his due process claim by failing to object in this regard (see *People v. Waidla* (2000) 22 Cal.4th 690, 718, fn. 4), and whether there was substantial evidence to support such an instruction in the first place, Iniguez could not have been prejudiced by the failure to instruct the jury with CALJIC No. 4.35. (*People v. Breverman* (1998) 19 Cal.4th 142, 176-178.) As the trial court commented, jurors were instructed with a series of self-defense instructions, including CALJIC No. 5.17 (actual but unreasonable belief in necessity to defend) which states: "A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of voluntary manslaughter or attempted voluntary manslaughter. [¶] As used in this instruction, an 'imminent' peril or danger means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] This principle applies equally to a person who kills in purported self defense or purported self defense of another."

The verdict establishes that the jury necessarily rejected the defense suggestion that Iniguez may have believed (reasonably or not) the victims were approaching rival gang members, and Iniguez fails to identify any other potentially applicable mistake of fact that would not have been encompassed within the instructions given. According to

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[5] CALJIC No. 4.35 states as follows: "An act committed or an omission made in ignorance or by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus a person is not guilty of a crime if [he][she] commits an act or omits to act under an actual [and reasonable] belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful."

the record, Iniguez had been loading and showing off his rifle at the party and later walked across the field with two fellow gang members, made a hand gesture, knelt down, took off his shirt, wrapped it around his wrist and—after Chavez had already shot about 10 bullets, started shooting his rifle. Iniguez has failed to demonstrate any prejudice in the trial court's failure to instruct the jury as he requested.

II. Iniguez Has Failed to Demonstrate Prejudicial Error in the Trial Court's Refusal to Instruct the Jury Regarding Prior Threats by Rival Gang Members.

Defense counsel requested the following modified version of CALJIC No. 5.50.1: "Evidence has been presented that on one or more prior occasions the Pocoima [sic] street gang made threats or committed assaults orparticipated [sic] in an assault or threat of physical harm uponor [sic] offered a perceived threat due to the structure of the gang culture to the Vineland Boys gang. If you find that this evidence is true, and you believe the defendant was a member of the Vineland Boys gang at the time the victim was killed, you may consider that evidence on the issues of whether the defendant actually and reasonably believed his life or physical safety, or the lives and physical safety of others, was endangered at the time of the commission of the alleged crime. [¶] In addition, a person or identifiable group whose life or safety has been previously threatened, or assaulted by others is justified in acting more quickly and taking harsher measures for self protection from an assault by those persons, than would a person who had not received threats from or previously been assaulted by the same person or persons."

Again, leaving to one side the issue of waiver for Iniguez's failure to object (see *People v. Waidla*, *supra*, 22 Cal.4th at p. 718, fn. 4), there was no substantial evidence to warrant the instruction in the first instance. (See *People v. Gonzalez* (1992) 8 Cal.App.4th 1658, 1663-1664.) Moreover, for the same reasons addressed in section I, *ante*, Iniguez has failed to show how he could have been prejudiced by the failure to instruct the jury in this regard. The evidence was overwhelming that Iniguez acted not

out of the belief of another gang's imminent attack, but rather, without provocation, "hunted" four unarmed victims who posed no threat—real or even mistakenly perceived—to Iniguez or anyone else and "attacked" them.

III. Iniguez Was Not Prejudiced by the Admission of Consciousness of Guilt Evidence.

Citing Evidence Code section 352, Iniguez objected to the admission of evidence that he had sought to inform other inmates that Fulgar was a "snitch." The prosecution argued that "putting out a hit on a witness that just testified against him is the most clear indication of consciousness of guilt that I can think of." The trial court said the evidence was "highly relevant" on the issue of Iniguez's consciousness of guilt and concluded that the introduction of such evidence "stands up to a prejudicial analysis."

Iniguez now contends that he was denied due process and a fair trial because of the admission of this evidence. We disagree.

The "admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) The trial court did not err. (*People v. Williams* (1997) 16 Cal.4th 153, 200-201.) Moreover, Iniguez could not have been prejudiced by the introduction of this testimony in light of the overwhelming evidence of Iniguez's guilt as well as the considerable evidence of his gang's intimidation of witnesses and willingness to retaliate against and kill "its own."

IV. We Reject Iniguez's Claim that His Conviction of Willful, Premeditated and Deliberate Attempted Murder Is Unsupported by Substantial Evidence.

The jury convicted Iniguez of second degree murder as to Gutierrez and convicted him of willful, premeditated and deliberate attempted murder as to Stephens. According to Iniguez, the record does not support a finding of premeditation and deliberation so this finding must be stricken. He says there was "no evidence that [he] engaged in the

dispassionate weighing of choices required by CALJIC No. 8.20's definition of premeditation and deliberation."[6]

The jury requested and received readback of testimony from Fulgar about how Iniguez got down on his knees ("sitting down by leaning back") and from Santoya about "Iniguez kneeling down" and "who shot [Gutierrez]." The jury also requested "more interpretation in detail of what exactly premeditation is" and were referred back to the jury instructions. The record establishes that Iniguez walked up to four unarmed people, made some sort of gesture, knelt down, took off his shirt, wrapped the shirt around his arm and, after Chavez had shot about 10 times, shot a rifle several more times. Accordingly, we reject Iniguez's claim that insufficient evidence supports the jury's finding of premeditation and deliberation. As he concedes, citing *People v. Becker* (2000) 83 Cal.App.4th 294, 298, each count of a jury verdict stands alone, and the verdict as to one count has no bearing on another.

V. There Was No "Double Jeopardy" Violation in Using the Same Prior Conviction to Impose an Enhancement and a Three Strikes Term.

Acknowledging that other courts over the last decade have rejected the argument that a sentence is legally unauthorized by both the state and federal constitutions where a defendant's sentence is increased based upon the use of the same prior felony convictions as both prior serious felonies and "strikes" under the Three Strikes Law (*People v. Askey* (1996) 49 Cal.App.4th 381, 389, and *People v. Purata* (1996) 42 Cal.App.4th 489, 498), Iniguez says he makes the argument to preserve it for our Supreme Court's review. As stated in *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1518, "The drafters of the Three Strikes law have clearly provided that its punishment provisions apply 'in addition

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[6] Given the evidence that virtually everyone at the party was Hispanic except Stephens, the Attorney General argues that the jury reasonably could have found Gutierrez was a "tragic casualty in [Iniguez's] effort to kill a Black man to enhance his Hispanic gang's reputation."

to any other *enhancement or punishment provisions* which may apply.' (§ 667, subd. (e), italics added.)" Accordingly, we reject Iniguez's claim.

VI. Iniguez's Challenge to the Imposition of Consecutive Sentencing Must Fail.

Citing *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), and *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), Iniguez says the trial court's imposition of consecutive indeterminate terms on the murder and attempted murder counts violated his federal constitutional rights because no jury determined beyond a reasonable doubt (or at all) that the government had proven the facts necessary to permit the judge to impose consecutive sentences. We disagree.

Under *Apprendi, supra,* 530 U.S. at page 490, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely,* the United States Supreme Court emphasized that the "statutory maximum" for *Apprendi* purposes is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant statutory 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Blakely*, *supra,* 542 U.S. at pp. 303-304, original italics.)

At the time Iniguez filed his opening brief (and at the time he was sentenced), *People v. Black* (2005) 35 Cal.4th 1238 (*Black*) was controlling authority. In *Black,* our Supreme Court considered the "question whether a defendant is entitled to a jury trial on the aggravating factors that justify an upper term sentence or a consecutive sentence." (*Id.* at p. 1244.) The *Black* court held that "the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence *or consecutive terms* under

California law does not implicate a defendants Sixth Amendment right to jury trial." (*Ibid.*, italics added.) Iniguez noted, however, that the United States Supreme Court had "granted certiorari in a California case presenting the question of whether California's *Determinate* Sentencing law is unconstitutional in light of *Blakely* (*Cunningham v. California;* No. 05-6551)" and said he wished the preserve the issue for further review. (Italics added.)

After briefing in this case was completed, the United States Supreme Court issued its opinion in *Cunningham v. California* (2007) 549 U.S. __ [127 S.Ct. 856] (*Cunningham*). The *Cunningham* court considered the fact that "California's determinate sentencing law (DSL) assigns to the trial judge, not the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence" and held that "by placing *sentence-elevating* factfinding within the judge's province," the Determinate Sentencing Law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham, supra,* 549 U.S. __ [127 S.Ct. at p. 860], italics added.) "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied." (*Id.* at p. 869.) *Cunningham* did not address the issue of consecutive sentencing (or *in*determinate sentencing under California law).

"While there is a statutory presumption in favor of the middle term as the sentence for an offense (§ 1170, subd. (b)) [in the determinate sentencing context], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing. (§§ 669, 1170.1, subd. (a); rule 433(c)(3).)" (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) Section 669 grants the trial court "broad discretion" to impose consecutive sentences when a defendant is convicted of two or more crimes. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.)

Moreover, where, as here, a defendant is sentenced consecutively to two *in*determinate terms (see § 1168, subd. (b)), determinate sentencing rules do not apply, and the trial court has "full discretion" to impose consecutive sentences under the indeterminate sentencing law. (*People v. Murray* (1990) 225 Cal.App.3d 734, 750, citing *People v. Arviso* (1988) 201 Cal.App.3d 1055, 1058 ["a trial court may impose consecutive indeterminate terms without any statement of reasons whatsoever"].) In *Blakely*, *supra*, 542 U.S. at page 309, original italics, the Supreme Court observed: "Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned."

In this case, the jury reached separate verdicts as to counts one and two. Because the trial court had the discretion under sections 669 and 1168 to sentence Iniguez to full consecutive sentences based on the facts encompassed by the verdict alone—*without* making any additional findings of fact—the statutory maximum he faced for purposes of *Apprendi*, *supra*, 530 U.S. 466, *Blakely*, *supra*, 542 U.S. 296, and *Cunningham*, *supra*, 549 U.S. __ [127 S.Ct. 856], was a full consecutive term on counts 1 and 2. (See *People v. Diaz* (2007) 150 Cal.App.4th 254, 269; *People v. Groves* (2003) 107 Cal.App.4th 1227, 1231.) Accordingly, we reject Iniguez's claim that consecutive sentencing in this case violated the Sixth Amendment.[7]

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[7] Indeed, in sentencing Iniguez consecutively on count 2, the trial court noted: "this being a separate victim who received a separate injury." Accordingly, the court's decision did not violate *Apprendi*, *Blakely*, or *Cunningham* in any event because the fact supporting its decision *was* found true by the jury beyond a reasonable doubt as reflected in the separate verdicts on each count. (*People v. Shaw*, *supra*, 122 Cal.App.4th at p. 459.)

VII. Iniguez's Sentence Does Not Constitute Cruel and Unusual Punishment.

On this record, we summarily reject Iniguez's claim that his sentence amounts to cruel and unusual punishment. (*Ewing v. California* (2003) 538 U.S. 11; *Lockyer v. Andrade* (2003) 538 U.S. 63, 77; *People v. Cooper* (1996) 43 Cal.App.4th 815, 826-827.)

Iniguez had three prior convictions for vehicular manslaughter (§ 192, subd. (c)(1)), second degree robbery (§ 211), and battery with serious bodily injury (§ 243, subd. (d)). Then, while on parole, he and another gang member, both armed with guns, committed one murder and one attempted premeditated murder for the benefit of their street gang. Iniguez has failed to demonstrate that his case is the "exquisite rarity" where the sentence is so harsh as to shock the conscience or offend fundamental notions of human dignity so as to render his sentence unconstitutional. (See *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1631, citation and internal quotations omitted.)

DISPOSITION

The judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J. **ZELON, J.**